

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)
RESPONSIBILITY,)
2000 P Street, NW, Suite 240)
Washington, D.C. 20036)

and)

Richard David Hammer)
2209 Iris Dr.)
Columbia, MO 65202)

Plaintiffs,)

v.)

Civil Action #

U.S. ENVIRONMENTAL PROTECTION)
AGENCY,)
Ariel Rios Building)
1200 Pennsylvania Avenue, NW)
Washington, D.C. 20004)

COMPLAINT

Defendant.)

PRELIMINARY STATEMENT

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, as amended, and the Privacy Act, 5 U.S.C. § 552a, *et seq.*, in order to compel the U. S. Environmental Protection Agency ("EPA") to disclose records wrongfully withheld after a joint FOIA and Privacy Act request and subsequent appeal from Plaintiffs. FOIA requires that federal agencies respond to public requests for documents, including files

maintained electronically, in order to increase public understanding of the workings of government and access to government information. The Privacy Act requires that federal agencies provide an individual access to records or information contained in a system of records and pertaining to him upon request.

2. Plaintiffs' FOIA/Privacy Act request sought all EPA records regarding a report written by Dr. Peter Maida concerning Dr. Richard David Hammer's workplace complaint. Plaintiff Public Employees for Environmental Responsibility ("PEER") filed the FOIA/Privacy Act request in its own right and for Plaintiff Richard David Hammer. Plaintiffs' request sought: 1) the report prepared by Dr. Maida in response to a complaint by Dr. Hammer regarding hostile work environment; and 2) all the supporting materials for this report written by Dr. Maida pertaining to Dr. Hammer and Dr. Hammer's workplace complaint. A consent form executed by Dr. Hammer verifying his identity and designating Plaintiff PEER as the recipient for the records was submitted with the FOIA/Privacy Act request.
3. Plaintiff PEER is a non-profit organization with tax-exempt status dedicated to research and public education concerning the activities and operations of the federal government.
4. Plaintiff PEER is a nonprofit service organization that works on behalf of public employees to address agency wrongdoing. Dr. Hammer is a former EPA employee who sought PEER's assistance in securing the requested documents. PEER responded to this request by submitting the FOIA and Privacy Act request at issue in this Complaint.

5. The sought records are a matter of public interest because they concern the operations or activities of the Government, and their disclosure is likely to contribute significantly to public awareness and understanding of these government activities.
6. The sought records are contained within a system of records and pertain to Dr. Hammer.
7. On December 19, 2011, Plaintiffs submitted the FOIA/Privacy Act request to EPA's FOIA and Privacy Act officer. By a letter dated December 28, 2011, EPA's National FOIA Officer, Larry F. Gottesman, acknowledged Plaintiffs' request and assigned it request number HQ-FOI-00485-12. In a letter dated January 4, 2012, Mr. Gottesman granted Plaintiffs' fee waiver request. Through an email sent to Plaintiffs on January 27, 2012, EPA Program Analyst Karis Boerner informed Plaintiffs that EPA's response was "awaiting final signature" and requested a ten working day extension to respond to Plaintiffs' request.
8. On February 14, 2012, EPA responded to Plaintiffs' FOIA/Privacy Act request denying it by invoking 5 U.S.C. §§ 552(b)(5), (b)(6) and (b)(7)(C) ("Exemptions 5, 6, and 7(C)" respectively). In this response, EPA stated that "[t]he requested report is an internal briefing document for ORD/NHEERL's decision making purposes only" and refused to disclose any of the requested material, claiming that it was all exempt from disclosure under FOIA Exemptions 5, 6, and 7(C).
9. On March 5, 2012, Plaintiffs appealed EPA's denial of Plaintiffs' FOIA/Privacy Act request. Plaintiffs appealed EPA's denial on the following grounds: 1) EPA failed to adequately correlate the claimed exemptions to the withheld material; 2) EPA failed to

identify how the material is deliberative or pre-decisional under Exemption 5; 3) EPA failed to show that privacy rights outweighed disclosure as required by Exemption 6; 4) EPA failed to show that the requested material was collected for law enforcement purposes or could be an unwarranted invasion of privacy as required by Exemption 7; 5) EPA made no apparent attempt to segregate nonexempt material; and 6) that the Privacy Act mandated releasing the documents and that EPA failed to acknowledge or respond to the Privacy Act request.

10. EPA acknowledged receipt of Plaintiffs' appeal by a letter dated March 7, 2012 and assigned the appeal number HQ-FOI-00485-12-A (HQ-APP-00072-12).
11. Exceeding the time limit for responding to appeals, in a letter dated May 2, 2012, Kevin M. Miller in EPA's Office of General Counsel, responded to Plaintiffs' appeal and denied the appeal in total. In its appeal denial, EPA continued to invoke exemptions 5 and 6, but gave cursory justifications for why the exemptions were appropriate and failed entirely to address other issues raised by Plaintiffs on appeal including EPA's failure to justify applying Exemption 7(C) and EPA's failure to acknowledge and address the Privacy Act component of Plaintiffs' request.
12. EPA's conduct is arbitrary and capricious and constitutes a violation of the FOIA, Privacy Act and the APA. EPA's conduct frustrates Plaintiffs' efforts to educate the public regarding how government agencies operate and infringes on Dr. Hammer's right to access information the EPA maintains pertaining to him.

13. Plaintiffs seeks a court order requiring EPA to immediately produce the documents sought in the December 19, 2011 FOIA/Privacy Act request, as well as all other appropriate relief, including attorney's fees and costs.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) and the Privacy Act, 5 U.S.C. § 552a(g). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).
15. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
16. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2412(d), 5 U.S.C. § 552(a)(4)(E), and 5 U.S.C. § 552a(g)(3)(B).
17. Venue is properly vested in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552a(g)(5). Venue is also proper under 28 U.S.C. § 1391(e), because a substantial part of the events and omissions which gave rise to this action occurred in this district.

PARTIES

18. Plaintiff Public Employees for Environmental Responsibility is a national non-profit organization with tax-exempt status, with its main office located in Washington, D.C., and field offices located in California, Colorado, Florida, Massachusetts, Arizona, New Jersey and Tennessee.

19. PEER is not a commercial enterprise for purposes of the fee waiver provisions of FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Among other public interest projects, PEER engages in advocacy, research, education, and litigation relating to the promotion of public understanding and debate concerning key current public policy issues, focusing on the environment, public lands and natural resource management, public funding of environmental and natural resource agencies, and ethics in government.
20. PEER is a service organization for current and former public employees. PEER works with public employees to address agency wrongdoing by providing a full range of services, including filing FOIA and Privacy Act requests on behalf of individuals and ensuring these requests are responded to.
21. Informing the public about these important public policy issues is central to PEER's mission. PEER educates and informs the public through news releases to the media, PEER's web site www.peer.org, which draws between 1,000 and 10,000 viewers per day, and PEER's newsletter which has a circulation of approximately 20,000, including 1,500 environmental journalists.
22. Plaintiff Richard David Hammer is a former EPA employee who, as a Supervisory Life Scientist, worked at the Western Ecology Division in Corvallis, Oregon. While he was employed in this position, Dr. Hammer filed a complaint regarding work place hostility he was subjected to. Dr. Maida was contracted to independently investigate and review the allegations in Dr. Hammer's complaint and wrote a report regarding Dr. Hammer's

allegations, including the hostile work environment that Dr. Hammer faced during his employment. Dr. Hammer never received a copy of this report.

23. Defendant EPA, is an agency of the United States as defined by 5 U.S.C. § 552(f)(1), and is charged with the duty to provide public access to documents in its possession consistent with the requirements of the FOIA and is denying Plaintiffs access to its records in contravention of federal law. EPA maintains a system of records containing information pertaining to Dr. Hammer and has possession and control of the records at issue in this Complaint and is denying Plaintiffs access to the records in contravention of federal law.

STATEMENT OF FACTS

24. Dr. Hammer is a former EPA employee and while he was employed at the EPA, he made a complaint regarding workplace hostility and other issues. Dr. Maida is a labor relations expert who was contracted to provide an independent assessment of, and wrote a report regarding, Dr. Hammer's allegations. Dr. Hammer requested that Plaintiff PEER pursue the report.
25. On December 19, 2011, Plaintiffs submitted a FOIA/Privacy Act request (HQ-FOI-00485-12) to EPA seeking all EPA records regarding a report written by Dr. Maida concerning Dr. Hammer's workplace complaint. Specifically, PEER sought: 1) The report prepared by Dr. Maida in response to a complaint by Dr. Hammer regarding hostile work environment; and 2) All the supporting materials for this report written by Dr. Maida pertaining to Dr. Hammer and Dr. Hammer's workplace complaint.

26. By a letter dated December 28, 2011, EPA's National FOIA Officer, Larry F. Gottesman, acknowledged Plaintiffs' request and assigned it request number HQ-FOI-00485-12. In a letter dated January 4, 2012, Mr. Gottesman granted Plaintiffs' fee waiver request. Through an email sent to Plaintiffs on January 27, 2012, EPA Program Analyst Karis Boerner informed Plaintiffs that EPA's response was "awaiting final signature" and requested a ten working day extension to respond to Plaintiffs' request.
27. On February 14, 2012, EPA responded to Plaintiffs' FOIA/Privacy Act request denying it and invoking 5 U.S.C. §§ 552(b)(5), (b)(6) and (b)(7)(C) ("Exemptions 5, 6, and 7(C)" respectively). In this response, EPA stated that "[t]he requested report is an internal briefing document for ORD/NHEERL's decision making purposes only" and refused to disclose any of the requested material, claiming that it was all exempt from disclosure under FOIA Exemptions 5, 6, and 7(C).
28. On March 5, 2012, Plaintiffs appealed EPA's denial of Plaintiffs' FOIA/Privacy Act request. Plaintiffs appealed EPA's denial on multiple grounds.
29. Plaintiffs appealed EPA's denial on the grounds that EPA's brief statement for why the information was withheld did not justify how the requested information fell within the claimed FOIA exemptions and that EPA failed to adequately correlate the claimed exemptions to the withheld material.
30. Plaintiffs also appealed EPA's denial stating that EPA failed to justify how the material is deliberative and predecisional as required to invoke Exemption 5 to withhold the requested records. EPA's cursory statement that the withheld material is "an internal briefing document for ORD/NHEERL's decision making purposes only," does not meet

the standard. Additionally, EPA's use of the words "Drafts of Documents" when claiming Exemption 5 implies that the Maida Report is insufficient to justify applying Exemption 5 because simply calling a document a draft does not render a document predecisional and deliberative.

31. Plaintiffs also appealed EPA's denial under Exemption 6. Under this exemption, an agency may only withhold documents when the privacy interest at stake outweighs the public interest in disclosure. In its denial, EPA simply claimed that the requested material "is exempt from mandatory disclosure pursuant to . . . Exemption 6, Personal Information Affecting an Individual's Privacy." EPA did not identify what information it was specifically withholding under Exemption 6 or the grounds for why Exemption 6 could plausibly apply to the requested material. Furthermore, EPA failed to show that personal privacy rights outweighed disclosure as required by Exemption 6. EPA merely stated that the exemption applies without balancing any interests.
32. Exemption 6 is also not applicable because Dr. Hammer consented to release of the Maida Report to PEER, which Plaintiffs included in the December 19, 2011 request. EPA did not address what, if any, other privacy interests could be involved.
33. Plaintiffs also appealed EPA's denial on the grounds that EPA failed to show that the requested material was collected for law enforcement purposes or could be an unwarranted invasion of privacy as required by Exemption 7. EPA merely claimed that the requested material "is exempt from mandatory disclosure pursuant to . . . [FOIA] Section 552(b)(7)(C), Exemption 7, Personal Information in Law Enforcement Records." EPA does not provide any explanation of how the Maida Report relates to an

enforcement proceeding or was compiled for law enforcement purposes. Under Exemption 7(C), the agency must also balance the public's interest in disclosure against the degree of the invasion of privacy that would result from disclosure to determine whether releasing the records would be an unwarranted invasion of privacy. EPA does not identify what specific material was withheld under this exemption nor does EPA address what privacy interests could possibly be at issue.

34. Plaintiffs also appealed on the grounds that EPA did not make any apparent attempt to segregate the non-exempt portions of the requested materials from the exempt portions, even assuming there is properly exempt information. As provided in 5 U.S.C. § 522, "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." EPA did not address segregation in its February 14, 2012 response.
35. Finally, Plaintiffs appealed the EPA's complete disregard of Plaintiffs' Privacy Act request. The Privacy Act trumps any claim of a FOIA exemption for withholding documents. According to the Privacy Act, "[n]o agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section." 5 U.S.C. § 552a(t). EPA claimed no Privacy Act exemption in this case and has not addressed this aspect of the request at all in any of its communications with Plaintiffs regarding the request.
36. Plaintiffs view EPA's failure to respond, or even acknowledge Plaintiffs' Privacy Act request as a denial of the request.

37. EPA acknowledged receipt of Plaintiffs' appeal by a letter dated March 7, 2012 and assigned the appeal number HQ-FOI-00485-12-A (HQ-APP-00072-12).
38. On May 2, 2012, after the statutory time limit for responding to an appeal, EPA's Office of General Counsel attorney Kevin M. Miller responded to Plaintiffs' appeal and denied it in total.
39. In this May 2, 2012 appeal denial, EPA addressed only some of the issues raised by Plaintiffs on appeal. In its May 2 letter, EPA stated that Exemption 5 was appropriate because the material "reflects the internal discussions and recommendations that were considered during EPA's decision-making process," and that "[r]elease of the withheld material would prematurely disclose proposed policies before they are finally adopted, and cause public confusion by disclosing reasons and rationales that were not in fact ultimately the grounds for EPA's action." This cursory explanation does not meet the requirements of Exemption 5 because, among other reasons, it does not identify a decision to which the material relates or any decision-making process, and only asserts general language for how the material could be considered deliberative. EPA has failed to justify withholding the requested material under Exemption 5.
40. EPA's May 2 denial also addressed Exemption 6 vaguely claiming that the requested material "contains information that applies to particular individuals." EPA also attempted to balance the public's right to disclosure against privacy rights, and found that because the information contained names and home addresses, privacy rights won the balancing test. No mention was made of redacting names and home addresses and no

other interests were discussed. Such explanations are insufficient to meet the EPA's burden of justifying applying Exemption 6 to withhold the requested records.

41. Lastly, in the May 2 denial, EPA concluded without sufficient explanation that the factual material was inextricably intertwined with deliberative material and thus could not be segregated.
42. EPA did not address the other arguments raised by Plaintiffs in its March 5, 2012 appeal.
43. EPA did not acknowledge or respond to the issues raised by Plaintiffs on appeal regarding the Privacy Act request in the May 2 denial.
44. EPA's short and general statements purporting to justify withholding the entire Maida report are a violation of FOIA and the Privacy Act because EPA is withholding information properly requested by Plaintiffs under both the FOIA and Privacy Act without justifying the withholding.
45. Plaintiffs are injured by EPA's unlawful withholding of properly requested records.
46. Plaintiffs has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C) for its FOIA request and Privacy Act request and now turns to this Court to enforce the remedies and access to agency records guaranteed by FOIA and the Privacy Act.
47. On January 21, 2009 President Barack Obama issued an Executive Memo declaring the following policy: "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.....All agencies should adopt a presumption in favor of disclosure, in order

to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”

CAUSES OF ACTION

Count I: Violation of the Freedom of Information Act

48. Plaintiffs repeats the allegations in paragraphs 1 through 47.
49. Defendant’s failure provide the requested information is a violation of FOIA, 5 U.S.C. § 552, and the agency’s own regulations promulgated thereunder.
50. Plaintiffs’ FOIA request has been wrongfully denied and information responsive to Plaintiffs’ FOIA request has been improperly withheld.

Count II: Violation of the Privacy Act

51. Plaintiffs repeats the allegations in paragraphs 1 through 47.
52. Defendant’s failure to provide the records requested violates the Privacy Act, 5 U.S.C. § 552a(d), and the agency’s own regulations promulgated thereunder.
53. Plaintiffs’ Privacy Act request has been wrongfully denied and information pertaining to Dr. Hammer has been improperly withheld.

RELIEF REQUESTED

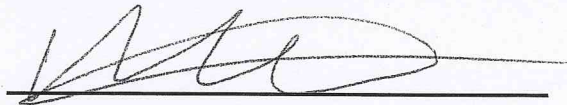
WHEREFORE, Plaintiffs respectfully requests and prays that this Court:

- i. Enter an Order declaring that Defendant has wrongfully withheld the requested agency records and records pertaining to Dr. Hammer;

- ii. Issue a permanent injunction directing Defendant to disclose to Plaintiffs all wrongfully withheld documents;
- iii. Maintain jurisdiction over this action until Defendant is in compliance with FOIA, Privacy Act, APA and every order of this Court;
- iv. Award Plaintiffs attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E) and 5 U.S.C. § 552a(g)(3)(B); and
- v. Grant such additional and further relief to which Plaintiffs may be entitled.

Dated: May 10, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Douglass', is written over a solid horizontal line.

Kathryn Douglass
DC Bar No. 995841
Staff Counsel
Public Employees for Environmental Responsibility
2000 P Street, NW, Suite 240
Washington, D.C. 20036
(202) 265-7337

Counsel for Plaintiffs